88-1263

No. 88 -

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROGER HOHL, ON BEHALF OF HIMSELF AND HIS DAUGHTERS, CASSANDRA & DANIELLE HOHL,

Petitioners,

vs.

WILLIAM W. MILLER, MAGISTRATE OF CASS COUNTY MAGISTRATE'S COURT FOR THE STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ROGER HOHL, PRO SE
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22pp

QUESTIONS PRESENTED FOR REVIEW

1. Is that part of the judgement appealed from, that is, the claim against the defendant Magistrate, William W. Miller, a final appealable order?

2. Did the Court of Appeals make an error in denying the appellant's motion for reconsideration, petition for rehearing?

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1989

No. 98-

ROGER HOHL, ON BEHALF OF HIMSELF AND HIS DAUGHTERS, CASSANDRA & DANIELLE HOHL,

Petitioners

vs.

WILLIAM W. MILLER, MAGISTRATE OF CASS COUNTY MAGISTRATE'S COURT FOR THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Petitioner Roger Hohl petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the district court is set forth on pages A1 to A5 of the appendix to this petition. (App. A1 to A5). The decision of the court of appeals in dismissing the appeal for lack of a final appealable order is designated on page A6 of the appendix. (App. A6). The court of appeals denial of appellant's motion for reconsideration, that is, his petition for rehearing is on page A7 of the appendix. (App. A7).

JURISDICTION

The judgement of the court of appeals in denying the motion for reconsideration, petition for rehearing, was entered on Nov. 1, 1988. (App. A7). This petition for writ of certiorari has been timely filed within the allowable ninety days. This court's jurisdiction is invoked under 28 U.S.C., subsection 1254(1).

STATUTES INVOLVED

28 U.S.C., subsection 1291, note 118 provides,

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Courts for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
>
> A judgement dismissing an action is a final decision.

28 U S.C. subsection 1291, note 119(a) provides,

> Dismissal with prejudice constitutes final appealable judgement and confers jurisdiction upon court of appeals.

28 U S.C., subsection 1291, note 144 provides,

> Order denying motion for default judgement was not an appealable order.

U.S. Court of Appeals Rule 5(e) provides,

> Any party adversely affected by any order issued under subdivision (b), (c), or (d) may file a motion to reconsider, vacate, or modify the order within 10 days after its entry. Any Any motion for reconsideration, vacation, or modification shall be referred to a three-judge panel that includes any judge who previously acted on the matter

28 U.S.C., subsection 1332 provides,

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between-
>
> (1) citizens of different States;

Article III, Section 2(1) of the U.S. Constitution provides,

> The judicial Power shall extend to all

Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other Public Ministers and Consuls;-to all Cases of admirality and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;- between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, an d foreign States, Citizens or Subjects.
Article VI, No. 2 of the U.S. Constitution provides,

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of

the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C., subsection 1254(1) provides,

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

STATEMENT OF THE CASE

The case against the respondent involves his violations of petitioner's civil rights as secured by state and federal law in the following particulars:

1. Failure to advise petitioner of his right to counsel;

2. Failure of respondent to appoint counsel to represent petitioner;

3. Failure of respondent to advise petitioner of right to remain silent;

4. Failure of respondent to inform

petitioner of right to preliminary hearing;

5. Failure of respondent to conduct any hearing or trial whatsoever;

6. Failure of respondent to conduct plea bargaining legally, that is, between the county attorney and counsel for petitioner. (Record, Complaint pages 24 thru 27).

Jurisdiction for this respondent in the district court is founded on diversity of citizenship, 28 U S.C. subsection 1332, and Article III, section 2(1) of the U.S Constitution, in addition to Article VI, no. 2 of the U.S. Constitution.

FACTS

On February 1, 1988, the aggrieved petitioner filed the complaint against the respondent magistrate and other county and state employees for false imprisonment and violations of his civil rights. On June 28, 1988, the district court denied petitioner's motion for default judgement against

the respondent and further dismissed the claim against same with prejudice due to his judicial immunity. (App. A1 thru A5). Petitioner appealed the district court's decision to the court of appeals which dismissed the appeal for lack of a final appealable order. (App. A6). Petitioner motioned for reconsideration, rehearing, and court denied the motion. (App. A7 thru A10).

ARGUMENT

Pursuant to the provisions of Ann. Code of Iowa, subsection 813.2, under Notes of Decisions, Magistrates, the defendant respondent is not immune to suit due to his failure to appoint counsel to represent the petitioner. His mistakes could not be corrected on appeal because petitioner did not have an attorney to appeal for him.

While the aggrieved admits he erred in appealing district court's judgement of denial

of his motions for default judgement against the respondent, and other remaining defendants, pursuant to the provisions of 28 U.S.C., subsection 1291, note 144, he maintains that the district court also erred in dismissing the appeal against the respondent for lack of a final appealable order. The appeal against the defendant magistrate is a final appealable order pursuant to 28 U S.C., subsection 1291, notes 118 and 119(a). Conerly v. Westinghouse Electric Corp., CA. Cal. 1980, 623 F.2d 117.

Based on the adverse circumstances concerning the serious abuse of his children, which has worstened since the filing of this action, petitioner further maintains the cou rt of appeals erred in denying his motion for reconsideration, rehearing. (Record, Complaint exhibits 1 thru 6). U.S. Court of Appeals Rule 5(e).

REASONS FOR GRANTING THE WRIT

The court of appeals decided an important question of federal law in dismissing the appeal for lack of a final appealable order. It has not been, but should be settled by this Court in order to demonstrate what is a final appealable order and what is not a final appealable order.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgement of the Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

Roger Hohl, Pro Se
P.O. Box 954
Hollywood, Florida 33020
1-305-923-5895 Hotel

APPENDIX

061588D1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

ROGER HOHL, on behalf of himself and his daughters, Cassandra and Danielle Hohl,

Plaintiff,

vs.

MARK HERVEY, Chief Deputy of Shelby County Sheriff's Department, et al,

Defendants

CIVIL NO. 88-9-W

ORDER

This matter comes to the court on motions for entry of default filed by plaintiff, Roger Hohl, and a motion to dismiss filed on behalf of Defendant William W. Miller. For the following reasons, the court grants Miller's motion to dismiss for failure to state a claim upon which relief may be granted and denies the plaintiff's motions for entry of default.

Plaintiff, who is proceeding pro se but not in forma pauperis, filed this action on February 1, 1988, against various municipal

and county law enforcement officers, Cass County, Iowa, Attorney John Otto and State Magistrate William W. Miller. The caption on the plaintiff's complaint lists the names of seven individuals as defendants. However, an examination of the certificate of service for the complaint and all other documents filed by the plaintiff indicates that none of the defendants the plaintiff has named have been properly served. It appears the plaintiff believed he could serve the named defendants by mailing process to the chief executive officer of the branches of government for which each defendant was employed. However, that mode of service can only be effective where the governmental organization itself is the defendant. In short, plaintiff has failed to properly serve the people he has named or to name as defendants the organizations he has served.

Because the plaintiff has not properly served the defendants, the court lacks personal jurisdiction over them and they are under no duty to respond upon a penalty of default. The plaintiff's responsibilities are wet forth in Rule 4(d)1 and 4(c)2(c), and a copy of those provisions is attached to this order. If the plaintiff fails to show that he has made a second attempt to serve the defendants he has named which complies with these subdivisions within twenty days of the receipt of this order, the court will dismiss this action on its own motion pursuant to Rule 4(j).

The court also finds that Defendant William W. Miller's motion to dismiss for failure to state a claim is meritorious, and therefore dismisses this action against him with prejudice. Miller is a state court magistrate who is entitled to absolute judicial immunity for all judicial acts. See Stump v. Sparkman, 435 U. S. 349 (1978).

Whether an act is "judicial" depends upon whether it is a function normally performed by a judge and whether the plaintiff dealt with the judge in his judicial capacity. Stump, 435 W. S. at 362. The only acts alleged against Defendant Miller in the plaintiff's complaint which conceivably could rise to the level of a constitutional violation were acts which clearly were performed in a judicial capacity.

IT IS THEREFORE ORDERED that plaintiff's motions for default are all denied.

IT IS FURTHER ORDERED that the plaintiff's claims against Defendant William W. Miller are dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiff shall show that he has served the defendants in compliance with Rule 4(d)1 and 4(c)2(C) within twenty days of the receipt of this order. Failure to comply will result in the dismissal of this action.

June 28th, 1988

signed

Donald E. O'Brien, Judge
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2147SI

ROGER HOHL, on behalf of himself and his daughters, cassandra & Danielle Hohl,

Appellants

vs.

Mark Hervey, Chief Deputy of Shelby County Sheriff's Department.; Stephen M. Wendt, Deputy of Cass County Sheriff's Dept.; Officer Davis of Atlantic Po,ice Dept.; Officer Green of Atlantic Police Dept,; Deputy Kauffman of Shelby County Sheriff's Dept.; John Otto, County Attorney of Cass County, Iowa; William E. Miller, Magistrate of Cass County Magistrate's Court,

Appellees

Appeal from the United States District Court for the Southern District of Iowa

The appeal is hereby dismissed for lack of a final appealable order.

September 19, 1988

A true copy.

MANDATE ISSUED: 11/16/88

ATTEST:

Clerk, U. S. Court of Appeals
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2147SI	*	
Roger Hohl, etc, et al,	*	
Appellants	*	Appeal from the United States Court
vs.	*	for the Southern District of Iowa
Mark Hervey, etc, et al,	*	
Appellees.	*	
	*	

Appellant's (Roger Hohl) pro se petition for rehearing has been considered by the Court and is denied.

November 1, 1988

Order entered at the Direction of the Court:
Clerk, U, S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROGER HOHL, *

Appellant *

v. *

MARK HERVEY, CHIEF DEPUTY OF SHELBY COUNTY SHERIFF'S DEPARTMENT *
and
STEPHEN M. WENDT, DEPUTY OF CASS COUNTY SHERIFF'S DEPARTMENT *
and
DEPUTY KAUFMAN OF SHELBY COUNTY SHERIFF'S DEPART* Case no. 88-2147SI
MENT
and
OFFICER GREEN AND DAVIS* OF ATLANTIC POLICE DEPARTMENT *
and
JOHN OTTO, COUNTY ATTORNEY OF CASS COUNTY *
and
WILLIAM W. MILLER, MAGISTRATE OF CASS COUNTY MAGISTRATE'S COURT FOR THE STATE OF IOWA,
*****

Appellees

*****

MOTION FOR RECONSIDERATION
~~PETITION FOR REHEARING~~

Pppellant, Roger Hohl, pro se, pursuant to the 8th Circuit Rule 5(e), hereby petitions for a rehearing for the following reasons:

1. On September, 19th, 1988, this Court dismissed the above-captioned appeal for lack of a final appealable order. (Exhibit 1)

2. Appellant maintains the parts of the orders appealed from were final orders entered on June 29th, 1988, in that the orders clearly state plaintiff's motions for default judgement are all denied and the claims against defendant Willaim W. Miller are dismissed with prejudice. (Exhibit 4 & 6)

3. The case was not dismissed by the district court nor was any dismissal entered for failure to properly serve the defendants. (Exhibit 4 & 5)

4. On the basis of the above, appellant maintains Court erred in dismissing the appeal for lack of a final appealable order.

WHEREFORE, appellant requests ~~a rehearing~~ reconsideration.

Respectfully Submitted,

Roger Hohl

Roger Hohl, Pro Se
2000 North Federal Hwy.
P.O. Box 954
Hollywood, Florida 33020

CERTIFICATE OF SERVICE

I hereby certify on thes 26th day of September, 1988, that a copy of the forefoing petition for rehearing was mailed first class, postage prepaid, to Craig Kelinson, Special Asst. Attorney General, Hoover State Office Building, Des Moines, Iowa 50319, for defendant Miller, to Richard G. Blane, II, 8th Floor Fleming Building, Des Moines, Iowa 50309, for defendant Wendt and Otto, to James P. Barry, Assistant County Attorney for Cass County, 522 Chestnut Street, Atlantic, Iowa 50022, for defendants Green & Davis, and to Jeffrey Larson, Shelby County Attorney, 1005-7th Street, Harlan, Iowa 51537 for defendants Hervey and Kaufman.

Roger Kohl